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IN THE

Supreme Court of the United States

October Term, 1966
No. 98

CHARLES ROBERT ANDERS,
Petitioner,

vs.

CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT.

THOMAS C. LYNCH,
Attorney General, of the State of California,

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

GEORGE J. ROTH,
Deputy Attorney General, of the State of California,

600 State Building,
Los Angeles, Calif. 90012,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT.

Opinions Below.

These proceedings on certiorari arise out of petitioner's 1957 felony conviction for possession of marijuana in Merced County, California. The judgment of conviction was affirmed on appeal by the District Court of Appeal, Third Appellate District, State of California, 3d Crim. 2880, on January 9, 1959, and is reported in 167 Cal. App. 2d 65, 333 P. 2d 854. [Ex. 1, Stip. as to Cont. of Rec.][1]

On January 21, 1965, petitioner's habeas corpus petition to the District Court of Appeal, Third Appellate District, State of California, collaterally attacking the

[1]Exhibit numbers refer to exhibits attached to the Stipulation as to Contents of Record on file herein.

previously affirmed judgment and for reinstatement of appeal, was denied in an unpublished memorandum opinion. [Tr. of Rec. p. 11.][2]

The Supreme Court of California, without opinion, denied petitioner's habeas corpus petition collaterally attacking the previously affirmed judgment and for reinstatement of appeal, on July 14, 1965. [Tr. of Rec. p. 26.]

Jurisdiction.

This Court granted leave to proceed in forma pauperis, and the petition for certiorari herein, on April 4, 1966. Petitioner alleges jurisdiction based upon 28 U.S.C. 1257(3).

Respondent believes this case is extremely close to mootness; but because the remote possibility exists that the instant conviction might affect petitioner in the future, no contention has been raised in that regard.

Petitioner served a prison term for burglary concurrently with a term for possession of narcotics beginning in 1951. In 1957 he commenced another term for possession of marijuana (the instant case). In 1964 he commenced another term for burglary consecutive to the 1957 marijuana term. [See Appendix.]

Under California's narcotic statutes, Health and Safety Code sections 11500 *et seq.*, increased penalties may result on future narcotic felony convictions if prior narcotic felony convictions are pleaded and proved. Thus petitioner, with two prior narcotic felony convictions, conceivably could receive an indeterminate sentence of from fifteen years to life imprisonment were

[2] "Tr. of Rec." refers to the printed Transcript of Record on file herein.

he in the future to be convicted of another narcotic felony. If, however, a new appeal was granted herein, the conviction was set aside, and a new trial resulted in an acquittal, petitioner would then have only one narcotic felony prior conviction. In that case, if he in the future were convicted of another narcotic felony, the penalty could be two to twenty years.

On the other hand, because of his two felony burglary prior convictions and disregarding any narcotic felony prior convictions, his future conviction of any one of a number of non-narcotic felonies[3] might result in an indeterminate life sentence as a habitual criminal. California Penal Code section 644.

Questions Presented.

1. What is the extent of the duty of court-appointed appellate counsel when in his conscientious professional opinion, formed after study of the complete record and consultation with his client, there is no merit to the indigent's first appeal as a matter of right?

2. Does due process or equal protection require court-appointed appellate counsel who has studied the complete trial record, explained and discussed the case with his client, and concluded that the appeal is without merit, to do more than inform the court of his conclusion?

---

[3]The crimes listed in the habitual criminal statute are ". . . robbery, burglary of the first degree, burglary with explosives, rape with force or violence, arson as defined in Section 477a of this code, violence, murder, assault with intent to commit murder, train wrecking, felonious assault with a deadly weapon, extortion, kidnaping, escape from a state prison by use of force or dangerous or deadly weapons, rape or fornication or sodomy or carnal abuse of a child under the age of 14 years, or any act punishable under Section 288 of this code, conspiracy to commit any one or more of the aforementioned felonies, . . .".

3. Does due process require a state appellate court to appoint other counsel for an indigent appellant when counsel first appointed has studied the complete trial record and transcript, has consulted with his client, has concluded that the appeal is without merit, the complete record is before the appellate court, appellant is permitted to file his own brief, and the court's decision is reached and opinion written only after study by the court of such brief and the complete trial record and transcript?

4. Does due process or equal protection require court-appointed appellate counsel to manufacture and present contentions when in his professional conclusion there is no merit to the appeal?

Statement of the Case.

The Trial.

In June, 1957, petitioner Anders and a codefendant, Jones, were charged by information with felonious possession of marijuana in violation of California Health and Safety Code Section 11500. [Tr. of Rec. p. 1.] Both were represented at a jury trial by Merced County Public Defender, Donald R. Fetz, Esq. [Ex. 2, Stip. as to Cont. of Rec., p. 1.]

Anders and Jones were stopped by police for slow driving and weaving causing a traffic jam on a major state highway. Anders was the driver. Jones was sitting to his right. Anders failed to produce a driver's license and was told he would be given a traffic citation. While the police officer was talking to Anders, a package was thrown from the passenger side of the car and landed nearby. Examination of the package dis-

closed three marijuana cigarettes and bulk marijuana sufficient to make about 70 more cigarettes. Anders and Jones were then placed under arrest. The car was then searched. Marijuana debris was found in the car and in clothing in the car belonging to each man. A marijuana cigarette was found in a jacket belonging to Jones. At the police station, marijuana debris was also found in the clothing then being worn by each man. The men also had $94 between them, $24 in ones, $30 in fives, and the balance in larger bills. The going rate for marijuana cigarettes in the area was $1 per cigarette. [Ex. 2, pp. 51-104.]

Neither Anders nor Jones testified at the trial, and comment by the prosecution was made and the court instructed the jury on this point. Each defendant was found guilty as charged. Probation referral was waived and each was sentenced to the state prison for the term prescribed by law (an indeterminate sentence of 6 months to 10 years). [Tr. of Rec. p. 2.]

The Appeal.

Anders filed a notice of appeal. Patrick Murphy, Esq., a member of the California Bar, was appointed to represent him by the California Third District Court of Appeal.

Three copies of the record consisting of a full clerk's transcript containing the court minutes and a full stenographic reporter's transcript were prepared and furnished free of charge: one copy for use of petitioner and his counsel; one for use of the California Attorney General; one for use of the Third District Court of Appeal. This appellate record included:

1. A copy of the information [Ex. 1, pp. 1-2];
2. Voir dire of the jury [Ex. 2, pp. 1-44];

3. Opening statement by the prosecutor [Ex. 2, pp. 45-48];
4. Opening statement by defense trial counsel [Ex. 2, pp. 48-50];
5. Testimony of all witnesses [Ex. 2, pp. 51-104];
6. List of all physical evidence [Ex. 1, pp. 4-5];
7. Opening final argument by the prosecutor [Ex. 2, pp. 105-109];
8. Final argument by defense counsel [Ex. 2, pp. 109-114];
9. Closing final argument by the prosecutor [Ex. 2, pp. 114-116];
10. Jury instructions given by the Court [Ex. 2, pp. 116-129];
11. Jury instructions proffered by the parties but refused by the Court [Ex. 1, pp. 9-16];
12. Proceedings relating to return of the jury with the verdict [Ex. 2, pp. 130-131];
13. Copy of the verdict [Ex. 1, p. 17];
14. Proceedings relating to waiver of probation and sentencing [Ex. 2, pp. 132-133];
15. Abstract of judgment and commitment order [Ex. 1, pp. 18-20];
16. Copy of the notice of appeal [Ex. 1, pp. 23-26].

After appointed counsel, Mr. Murphy, examined this extremely complete trial transcript, he concluded that the appeal was without merit. Then he visited and communicated with Anders and explained his views

and opinions to him. Finally, he wrote to the Presiding Justice of the appellate court which had appointed him:

> "This is to advise you that I have received and examined the trial transcript of CHARLIE ANDERS as it relates to his conviction of the crime of possession of narcotics.
>
> "I will not file a brief on appeal as I am of the Opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him as they relate to his appeal.
>
> "Mr. Anders has advised me that he wishes to file a brief in this matter on his own behalf." [Tr. of Rec. p. 6.]

Anders, after discussing the case with Mr. Murphy, wrote the appellate court asking for appointment of other counsel on appeal. [Ex. 5.]

The court advised Anders that it had heard from Mr. Murphy; that new counsel would not be appointed; that he could file a brief himself or let the court decide the appeal on the record. [Ex. 6.] [This was the same detailed record that Anders and his counsel had previously received.]

Anders filed his own brief. [Ex. 8.] Respondent filed a brief. [Ex. 9.] Anders filed a closing Brief. [Ex. 10.]

The District Court of Appeal unanimously affirmed the judgment in a written opinion which carefully considered each issue raised in Anders pro se brief. [Ex. 11.]

The Habeas Corpus Applications.

Anders filed a petition in habeas corpus on January 21, 1965, with the District Court of Appeal that originally affirmed the judgment, for reinstatement of his appeal in the instant matter, urging denial of appellate counsel per *Douglas v. California,* 372 U.S. 353 (1963). [Tr. of Rec. pp. 8-10.] This petition was denied in an unpublished per curiam memorandum opinion:

> "The petition for writ of habeas corpus to reinstate applicant's appeal is denied since the procecedure prescribed by In re Nash, 61 A.C. 538, was followed in this case and this court has again reviewed the record and has determined the appeal was without merit." [Tr. of Rec. p. 11.]

On June 25, 1965, Anders filed a petition in habeas corpus in the California Supreme Court urging denial of counsel under *Douglas* and also improper comment on failure to take the witness stand per *Griffin v. California,* 380 U.S. 609 (1965). [Tr. of Rec., pp. 12-25.] This petition was denied without opinion on July 14, 1965. [Tr. of Rec., p. 26.]

On April 4, 1966, this Court granted Anders leave to proceed in forma pauperis and granted his petition for certiorari. [Tr. of Rec., p. 27.]

Summary of Argument.

The quantum of constitutional due process and equal protection furnished to petitioner by California on his 1958 appeal probably equalled or exceeded the maximum requirements of every other state and federal standard at that time, and even up to the present writing. California furnished petitioner without cost a full clerk's

and stenographic reporter's trial transcript; a lawyer who studied this record and visited and communicated with his client; an appellate court which studied and analyzed this same extensive record after appointed counsel informed it that in his professional judgment the appeal was without merit; an appellate court which did not dismiss the appeal but analyzed the case and each of petitioner's contentions in a detailed written opinion.

Long before *Douglas v. California,* 372 U.S. 353 (1963), counsel was appointed in the instant case solely because an indigent appellant had requested such aid on his first appeal as a matter of right. The court did not make the latter declared error of first looking at the record itself to see if appointment of counsel would be worthwhile.

There is an unavoidable distinction between rich and poor because of the nature of the appointed counsel system. The laywer for the paying client can inform his client in *confidence* of his professional opinion that the appeal is without merit; however, the lawyer appointed to represent the indigent appellant must also report his conclusion back to the court so that the appellate process can continue.

He can report to the court in three ways: (1) by a simple "no-merit" letter, as in the instant case, which least psychologically prejudices the court against his client's case; (2) by a detailed memorandum justifying his conclusion and proving how hopeless his client's case really is; or (3) by writing the same brief he might write if the paying client insisted on spending his money with full knowledge that the ultimate result would be affirmance of the judgment.

Under the no-merit letter method, the indigent is fully protected because an advocate has been placed as a shield between the record and the court. If there is any hidden error or argument to marshal, he does so in a brief; however, when there is no merit he merely so advises the court, and then, in California, the court itself reads and analyzes the record and writes its opinion, resulting in a further check on the attorney's professional conclusion.

The detailed memorandum method, followed in the the District of Columbia, is based on a distrust by the court in the integrity and ability of counsel it appoints. An acceptance of a memorandum written by such counsel results in dismissal of the appeal without the court ever seeing the complete record. This second method implies deprivation of constitutional due process and equal protection where the court reaches its decision based upon material coming from an untrustworthy source.

The written brief method merely prolongs the final return of the remittitur, for if there is no merit to the case, the result will necessarily be the same for a rich or a poor appellant. The rich man merely buys a stall for time; he can be out on bail pending appeal. But the poor man in jail may be actually harmed by such a stay in those instances where the prison sentence does not commence until the appeal is final.

Under the California no-merit letter method, where the appellate court itself studies the full record, there is no invidious distinction between rich and poor, and neither due process nor equal protection requires appointment of more than one counsel for the indigent appellant.

ARGUMENT.

I,

Petitioner Received Every Element of Due Process and Equal Protection, Including Some Requirements Not Even Enunciated by This Court Until Years Later, When in 1958, He Took His First Appeal as a Matter of Right.

When, in 1958, petitioner took his first appeal as a matter of right from his conviction for possession of marijuana, California gave him every element of due process and equal protection, including some requirements not even enunciated by this Court until years later.

He was furnished a *full* trial transcript, the more expensive state alternative set out in *Griffin v. Illinois*, 351 U.S. 12, 19-20 (1956), and received free and entirely at the expense of the State of California a copy of the information, the detailed voir dire of the jury, the opening statements of prosecution and defense counsel, the examination and testimony of all witnesses, the list of physical evidence, the closing arguments of counsel for each side, the jury instructions given and refused, the proceedings at the return of the verdict, the poll of the jury, a copy of the verdict, the proceedings relating to waiver of probation and sentencing, a copy of the abstract of judgment and commitment order, a copy of the notice of appeal, and a copy of all the clerk's minutes involved in the case.

He did not have to pay any filing fee to appeal his conviction.

See,

Burns v. Ohio, 360 U.S. 252 (1959);
Smith v. Bennett, 365 U.S. 708 (1961).

He received appointed counsel without cost who studied the full record, communicated with him, visited him and discussed the case with him. The appellate court, therefore, was not ". . . forced to prejudge the merits [of the case] before it [could] even determine whether counsel should be provided." See *Douglas v. California*, 372 U.S. 353, 356 (1963).

Petitioner also received something additional on his appeal which this Court has not even yet enunciated as a constitutional requirement of either due process or equal protection.

Although his appointed counsel concluded the case was without merit, he still received full appellate review.

See,

Lane v. Brown, 372 U.S. 477 (1963).

See also,

Draper v. Washington, 372 U.S. 487 (1963);

Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (1958).

A copy of the entire clerk's transcript and stenographic reporter's transcript previously referred to, which had already been studied by appointed counsel, was also on file with the appellate court. When counsel informed the court of his conclusion that there was no merit to the appeal, the record was nevertheless carefully researched and studied by the court before it reached its decision and wrote its opinion. See Appendix B of Petitioner's Brief herein which points out that the practice followed before *Douglas v. California, supra*, 372 U.S. 353 (1963), by this very same Third District Court of Appeal which had Anders' appeal be-

fore it, even in cases like this where counsel had written a no-merit letter, was to have a research attorney and the judge assigned to write the opinion go over the case and examine the transcript before the entire court finally decided the case.

II.

In Petitioner's 1958 Appeal, the Appellate Court Appointed Counsel for Him by Virtue of the Fact He Was an Indigent, and It Did Not Make the Later Douglas v. California Error of Conducting Its Own Preliminary Ex Parte Examination of the Record to First Determine if the Case Had Merit Before It Would Make the Appointment.

In 1958, five years before *Douglas v. California, supra,* 372 U.S. 353 (1963), declared it was error for an appellate court to conduct its own preliminary ex parte examination of the record to determine if the case had merit enough to warrant appointment of counsel, the California Third District Court of Appeal in this case *did not make that error.* After the record was filed with that court, it appointed counsel for petitioner before it made any determination on the merits, merely by virtue of the fact that he was an indigent who had appealed a criminal case.

In *Douglas,* this tribunal set as the nationwide standard of appellate due process, the same standard followed by the Third District Court of Appeal in Anders' case in 1958. *Douglas* required that an appellate court must appoint an attorney for an indigent who would be a shield between the record and the court's initial determination of the merits of the case.

Douglas required the court, *before* it made any determination on the merits of the appeal, to appoint appel-

late counsel who would give the poor man the same treatment he would give the paying client; counsel who, as an advocate, would examine the record, research the law, and marshal arguments to the court on his client's behalf for correction of any overt or hidden error *he could discover.*

In *Douglas,* this court said:

> ". . . If he cannot [pay] the *appellate court is forced to prejudge the merits before it can even determine whether counsel should be provided. At this stage in the proceedings* only the barren record speaks for the indigent, and, unless the printed pages show that an injustice has been committed, he is forced to go without a champion on appeal. Any real chance he may have had of showing that his appeal has hidden merit is deprived him *when the court decides on an ex parte examination of the record* that the assistance of counsel is not required." (Emphasis added.) (p. 356.)
>
> "When an indigent is forced to run this gantlet of *a preliminary showing of merit,* the right to appeal does not comport with fair procedure." *Douglas v. California, supra,* 372 U.S. 353, 357 (1963). (Emphasis added.)

In the instant 1958 case, the Third District Court of Appeal appointed Mr. Murphy as the shield between the record and the Court's initial determination of the merits. Mr. Murphy, as an advocate, studied the record, and consulted with his client; but he could find no merit to the appeal, and thus there were no arguments which he could marshal on his client's behalf.

We submit that in 1958, Anders' appellate treatment complied with the constitutional standards of due process and equal protection later set up in *Douglas v. California, supra.*

III.

Petitioner Received the Appointment of Competent Counsel Who Was as Effective an Advocate as Possible Under the Circumstances, in View of the Utter Lack of Merit to the Appeal.

A. California Agrees That There Must Be No Invidious Distinction Between Rich and Poor in the Administration of Criminal Justice.

Certainly, California agrees with the proposition set forth in *Griffin v. Illinois,* 351 U.S. 12 (1956), and reiterated in *Douglas v. California,* 372 U.S. 353 (1963), that there must not be any invidious distinction between rich and poor in the administration of criminal justice, and also with the proposition that appointment of appellate counsel means the indigent must receive adequate representation, *Ellis v. United States,* 356 U.S. 674 (1957), by counsel acting as an effective advocate on the indigent's first appeal as a matter of right. See *Cruz v. Patterson,* 253 Fed. Supp. 805 (1960) adopted on August 8, 1966, as the opinion of the Tenth Circuit Court of Appeals in *Patterson v. Cruz,* 10th Cir. No. 8726, July Term, 1966,.... F. 2d ..... Cert. denied December 5, 1966, 35 L. Week 3201, ... U.S. .....

The *Cruz* case is interesting because it illustrates a situation deceptively similar to the instant case, but clearly distinguishable, and which points up the distinction between an amicus curiae and an advocate.

On his initial 1959 appeal, Cruz, unlike Anders, was denied appointment of appellate counsel. His pro se appeal was affirmed on the merits in 1962 by the Colorado Supreme Court.

After *Douglas* was decided, Cruz petitioned the Colorado trial court in habeas corpus, contending he should be released as he was denied due process and equal protection when he was not furnished any appellate counsel on his initial appeal. The trial court denied this petition and the Colorado Supreme Court affirmed this denial of the habeas corpus petition by the trial court.

Because of the "peculiar circumstances," however, the Colorado Supreme Court ordered the trial court to appoint counsel with instructions to him to examine the record and determine if all original points urged by Cruz in pro se were adequately raised and if any new points could be discovered. If counsel felt the briefs were inadequate or if he found any new points, he was to file a supplemental brief on Cruz's behalf.

Counsel reported back that he could find no new points and all points raised had been completely reviewed by the Colorado Supreme Court.

The Colorado Supreme Court then adhered to the decision it had rendered on the first appeal, declined to appoint other counsel in the case, and reaffirmed its previous judgment in the matter (denying the habeas corpus petition). (See *Cruz v. Colorado,* .... Colo. ...., 401 P. 2d 830 (1965).)

Cruz then petitioned the Federal District Court in habeas corpus. That court granted the petition on the ground that counsel had acted as an amicus curiae instead of an advocate. It believed the Colorado Su-

preme Court's order limited counsel to a reviewing, advisory function whereby he had to determine if the 1962 existing Opinion was correct.

If the *Cruz* case had arisen in California, the state habeas corpus petition based on the pre-*Douglas* denial of appellate counsel would have been summarily granted without first appointing counsel to study the record and report his findings to the court.

Under the California post-*Douglas* appellate practice, habeas corpus petitions are summarily granted where pre-*Douglas* denials of appellate counsel occurred. In those cases, the remittitur is recalled, the original judgment and opinion are vacated, counsel is appointed, a record is furnished to him and the matter is treated as an original appeal.

See for example:

People v. Collins, 220 Cal. App. 2d 563, 565-566, 33 Cal. Rptr. 638, 639-640, 255 P. 2d 59 (1963);

People v. Cooper, 221 Cal. App. 2d 448, 450, 34 Cal. Rptr. 519-520 (1963);

People v. White, 239 Cal. App. 2d 355, 356, 48 Cal. Rptr. 756, 757 (1966).

It appears that the *Cruz* case result in the Federal District Court occurred because that Court apparently thought Colorado should have given absolute retroactive application to *Douglas v. California,* 372 U.S. 353 (1963). See *Donnell v. Swenson,* 258 Fed. Supp. 317 (U.S.D.C. W.D. Mo. 1966).

Under the Federal District Court analysis, counsel was appointed by the Colorado Court to see if the original Opinion should have been vacated. If counsel did

not reach that conclusion, *Cruz* would never receive his first appeal as a matter of right with representation by counsel. Under this analysis, any counsel who studied the case to see if it should be reopened could be looked upon only as an amicus regardless of how much energy he exerted on the indigent's behalf.

The *Cruz* case in some respects resembles *Lane v. Brown,* 372 U.S. 477 (1963), where the determination of the Illinois Public Defender that the coram nobis petition had no merit precluded the indigent from any appeal whatever. Cruz was entitled to a new appeal under *Douglas* if it is absolutely retroactive; the report of counsel that there were no new issues, and all previous issues had been adequately briefed, deprived Cruz of that new appeal.

B. California Disagrees With Petitioner's Suggestion That Minimum Standards of Due Process Require Marshalling of Some Argument on Behalf of the Indigent Even Though Competent Counsel Can Discover No Error in the Record.

We also agree that effective advocacy includes ". . . counsel's examination [of the] record, research of the law, and marshalling of arguments on his [the indigent's] behalf." *Douglas v. California,* 372 U.S. 353, 358 (1963).

But we take strong issue with the line of reasoning which concludes that *even though there is no error to be found in the trial record,* counsel is derelict in his duty, or at most is scornfully referred to as an "amicus," unless he marshals *some* arguments in his client's behalf.

We submit that *if there is no error, there are no arguments to be marshalled.* And in the instant case, there was no error recognizable in the record at the time the appeal was taken in 1958.

Mr. Murphy, appointed counsel, studied the record, communicated and consulted with his client, and formed the professional judgment that the appeal was without merit. It is significant, in this connection, that his conclusion has never been overturned.

The three judges of the Third District Court of Appeal who studied the full and complete record found no merit when they initially affirmed the judgment. [Ex. 11.]

When the case came up on the habeas corpus petition in 1965, three other[4] judges of the Third District Court of Appeal again reviewed the record and again determined the appeal was without merit. [Tr. of Rec. p. 11.] And petitioner's present counsel on certiorari has also been unable to discover any merit to the appeal.

By now, at least six lawyers (two for petitioner, two for the State of California, and two court research attorneys) and six impartial appellate justices have made a detailed study of the record and applicable law and still have found no grounds for which argument should have been marshalled in a brief on behalf of petitioner in 1958.

True, today we can look at the record and see that it contains the prosecution comment and jury instruction on failure of the defendant to testify which was con-

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[4]The three original justices were Peek, Schottky and Warne. [Ex. 11. p. 4.] On habeas corpus, the court consisted of Justices Pierce, Friedman and Regan. (231 Cal. App. 2d, p. iv.)

demned in *Griffin v. California,* 380 U.S. 609 (1965). [Ex. 2, pp. 107-108, 114-115, 119-120.] But even that error is not applicable to cases such as the instant one which were final prior to the date of the *Griffin* decision. *Tehan v. Shott,* 382 U.S. 406 (1966).

It is conceivable that some lawyer may still search the record and now find an argument which should have been raised in 1958; but we submit that if such an argument were first to be found now, after the extensive examination this record has received to date, the discovery would only emphasize the competency and adequacy of counsel appointed by California to represent petitioner on his first appeal as a matter of right.

C. California Disagrees With the Suggestion That Minimum Standards of Appellate Due Process Require Appointed Counsel to Urge Reversal or Distinction of Long Existing Law Merely Because the Subject Remotely Exists in the Record.

Petitioner's implied suggestion that Mr. Murphy was derelict in his duty for not writing a brief at least advocating the overruling or distinction of *Adamson v. California,* 332 U.S. 46 (1947), is in reality the argument that minimum effective appellate advocacy for due process purposes requires appointed counsel in every case to attempt the overruling or distinction of *all* prior decisions which might be said to curtail defendants' constitutional rights; of his own state's highest court as well as of this Court, if anything exists in the record relative to the subjects covered.

In the instant case, to take some obvious examples, petitioner was charged by information instead of in-

dictment; the arrest, although without a warrant, was clearly based upon probable cause; the search of the car, also without a warrant, was clearly incidental to the arrest. Can it now be reasonably urged that Anders did not receive due process because Mr. Murphy in 1958 failed to write a brief urging the overruling or distinction of longstanding principles of law recognizing the constitutional validity of such practices? We do not think so.

The list of possible arguments which could be raised on any appeal varies in direct proportion to the depth of the legal analyst's imagination. But it should not be said that failure to raise and brief them because the evidence of the particular rules exist in the record in the abstract, is any denial of due process.

Nor is it proper to urge that appointed counsel should only raise such arguments when there is nothing else that may be said in the indigent's behalf. For if the arguments are any good at all, they should be urged in every case, lest the claim be later raised by other appellants that they were also deprived of due process because appointed (or paid) counsel did not brief all the possible issues conceivably existing in the record.

We submit that on his 1958 appeal Anders received the appointment of a competent advocate who was as effective as possible under the circumstances, in view of the utter lack of merit to the appeal.

IV.

Where the Appellate Court Not Only Has Confidence in the Integrity and Ability of Counsel It Appoints to Represent Indigent Appellants, but Additionally Examines the Entire Record and Carefully Researches Applicable Law Before Deciding the Case and Writing Its Opinion, Due Process and Equal Protection Do Not Require Any Additional Checks When Appointed Counsel Concludes as an Advocate That the Appeal Is Without Merit and so Notifies the Court.

Petitioner first argues that Mr. Murphy, his appointed appellate counsel, was derelict in his duty and acted as an adversary because he told the court that in his opinion there was no merit to the appeal; but then petitioner diametically argues that Mr. Murphy did not go far enough and should have filed a confidential memorandum with the court analyzing the case legally with citations of authority to back up his conclusion that his client had no case.

The first argument is made by petitioner to criticize the procedure followed in the instant case in 1958, and which was later approved by the California Supreme Court after *Douglas v. California,* 372 U.S. 353 (1963).

In *In re Nash,* 61 Cal. 2d 491, 39 Cal. Rptr. 205, 393 P. 2d 405 (1964), the situation was almost identical with what had occurred in the instant case over five years previously. In *Nash,* the Court said, per Justice Traynor:

> "Petitioner contends that he was denied effective representation of counsel on appeal when the counsel appointed to represent him informed the court that he could find no meritorious grounds of

appeal and refused to file a brief or argue the case orally. He contends that the appellate court should have appointed another counsel to represent him or, at least, formally relieved counsel of his assignment and offered petitioner the opportunity personally to present oral as well as written argument.

"In *Douglas v. State of California,* 372 U.S. 353 [83 S.Ct. 814, 9 L.Ed.2d 811], the United States Supreme Court held that it was a denial of equal protection of the laws to refuse to appoint counsel to represent an indigent defendant on his appeal from a criminal conviction. (See also *Vasquez v. District Court of Appeal,* 59 Cal.2d 585, 586-587 [30 Cal.Rptr. 467, 381 P.2d 203].) We believe that the requirement of the *Douglas* case is met, however, when, as in this case, counsel is appointed to represent the defendant on appeal, thoroughly studies the record, consults with the defendant and trial counsel, and conscientiously concludes that there are no meritorious grounds of appeal. If thereafter the appellate court is satisfied from its own review of the record in the light of any points raised by the defendant personally that counsel's assessment of the record is correct, it need not appoint another counsel to represent the defendant on appeal and may properly decide the appeal without oral argument. (See *Federal Communications Com. v. WJR,* 337 U.S. 265, 276, 283-284 [69 S.Ct. 1097, 93 L.Ed. 1353, 1360, 1364-1365]; *Dyke Water Co. v. Public Utilities Com.,* 56 Cal.2d 105, 125 [14 Cal.Rptr. 310, 363 P.2d 326].)

"This procedure, which was adopted by the District Court of Appeal in this case, afforded petitioner substantially the same representation by counsel on appeal as is afforded indigent federal prisoners seeking to appeal in forma pauperis. (See *Coppedge v. United States,* 369 U.S. 438, 446 [82 S.Ct. 917, 8 L.Ed. 2d 21, 28-29]; *Ellis v. United States,* 356 U.S. 674, 675 [78 S.Ct. 974, 2 L.Ed.2d 1060, 1061]; *Johnson v. United States,* 352 U.S. 565, 566 [77 S.Ct. 550, 1 L.Ed.2d 593, 594]; *United States v. Pravato,* 282 F.2d 587, 591; *Porter v. United States,* 272 F.2d 695; see also *State* ex rel. *White v. Hilgemann,* 218 Ind. 572, 578-579 [34 N.E.2d 129]; *People v. Brown,* 55 Cal.2d 64, 73-74 [9 Cal.Rptr. 816, 357 P.2d 1072]; concurring opinion; *People v. Linden,* 204 Cal.App.2d 745 [22 Cal.Rptr. 633].) Admittedly, it does not insure exact equality between indigent defendants and those who have ample funds to retain counsel, for undoubtedly a defendant with sufficient funds could ultimately find counsel to brief and argue even the most frivolous appeal. Exact equality, however, is impossible to attain (see *McGarty v. O'Brien,* 188 F.2d 151, 155, 157; *United States v. Baldi,* 192 F.2d 540, 547, affd. 344 U.S. 561, 568 [72 S.Ct. 391, 97 L.Ed. 549, 556]), and the United States Supreme Court recognized in the *Douglas* case that it is not required; that only 'invidious discrimination' denies equal protection. (*Douglas v. State of California,* 372 U.S. 353, 356-357 [83 S.Ct. 814, 9 L.Ed. 2d 811, 814]; see also *Norvell v. Illinois,* 373 U.S. 420, 423-424 [83 S.Ct. 1366, 10 L.Ed. 2d 456, 459].) Competent counsel was appointed to represent peti-

tioner on appeal. He was not subject to invidious discrimination because neither that counsel nor the District Court of Appeal could discover a meritorious ground of appeal and the court therefore refused to appoint another counsel to represent him."

In re Nash, supra, 61 Cal. 2d 491, 495-496 (1964).

Petitioner's first argument, that appointed appellate counsel who notifies the court the case is without merit is an adversary, fails to take into account the indigenous aspect of every court-appointed appellate counsel system which of necessity differentiates it from the privately retained counsel situation.

In the private retainer situation, the lawyer's professional conclusion that the case is without merit is communicated in *confidence* to the client. If the client wants to spend his money to have this counsel or another counsel prepare a brief for the court to read, he may do so; however, he knows *the eventual result will be affirmance of the judgment.* What the client really buys with his money is a postponement of service of his sentence so long as his lawyer can forestall the return of the remittitur to the trial court.

If the same client has no money to pay the fee, and the court appoints the same lawyer to represent him, the no-merit conclusion would necessarily be the same as before; however, this time the lawyer would not only tell his client his conclusion, but he would also have to report it back to the court that appointed him. To this extent, the traditional confidential lawyer-client relationship cannot exist under the appointed counsel system.

Since appointed counsel has to tell the court something, in order for the appellate process to continue, it would appear that three courses are open to him, when, after study of the record, and consultation with his client, he concludes in his best professional judgment the appeal is without merit.

(1) He can write a simple no-merit letter, as was done in the instant case, which informs the court only of his conclusion. In California, this leaves the appeal to continue; it is not dismissed, and the court which reads the full record and analyzes the applicable law is thus psychologically unprejudiced by an array of principles of law and argument mustered against the client solely to justify the attorney's conclusion.

(2) He can file the detailed District of Columbia type memorandum, proving to the court that he has done his "homework" and at the same time mustering all the authorities proving his client has no case.

It is difficult to reconcile this method with the constitutional requirement for advocacy, particularly where, as in the District of Columbia, the court, which does not read the entire record, dismisses the case if the memorandum is strong enough.

(3) He can write the same brief he might write if the client was paying his fee. But the indigent client will gain nothing, and in some instances may even be harmed. For regardless of what appointed counsel puts into the brief, if the case has no merit, the judgment will necessarily be eventually affirmed. And in those situations where the prison sentence does not commence until the remittitur is returned to the trial court, the indigent client who has not been able to post

bail pending appeal will have served a lengthy period of what is commonly referred to as "dead time."

As a corollary to this, are two propositions: (a) since the only difference between the man who can pay and the indigent appellant in California is the stall for time, the distinction between the two economic groups is not invidious; (b) any brief filed will necessarily be frivolous when there is no merit to the appeal.

Petitioner's second argument, in favor of a detailed analysis of the record to back up appointed counsel's conclusion of no merit, is based upon two cases in the Court of Appeals for the District of Columbia: *Tate v. United States,* 359 F. 2d 245 (D. C. Cir. 1966) and *Johnson v. United States,* 360 F. 2d 844 (D. C. Cir. 1966).

Both *Tate* and *Johnson,* however, deal with entirely different situations from petitioner Anders' case.

In the *Tate* and *Johnson* type of case, there is generally no transcript of the record before the appellate court before or after counsel is appointed. *Bond v. United States,* 360 F.2d 504, U.S.C.A. (D. C. Cir. 1966).[5] In the instant case, however, petitioner received free, and there was at all times before the appellate court, an extremely extensive and complete

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[5]See also: "SUGGESTIONS TO COUNSEL APPOINTED BY THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN CRIMINAL CASES AND IN CASES UNDER 28 U.S.C. SEC. 2255" dated January, 1964, prepared by the Legal Aid Committee of the Bar Association of the District of Columbia, which the Clerk of the United States Court of Appeals for the District of Columbia Circuit has advised respondent is given to appointed counsel in that circuit at the time of their appointment.

clerk's and stenographic reporter's transcript. (See Resp. Br., pp. 5-6, *supra.*)

Under the *Tate* and *Johnson* situations, upon counsel's advising the appellate court that in his opinion the appeal is without merit and his being granted leave to withdraw, unless the appellant proceeds in pro se, the appeal is dismissed. Under the California procedure exemplified in the instant case, however, the appeal continues whether the appellant writes a brief or not, and at least one research attorney and the judge assigned to write the opinion carefully study the complete transcript and research the applicable law before the decision of the full appellate court is made and the opinion issued. (See pages 12-13, *supra*, and Petitioner's Brief. Appendix B.)

Petitioner suggests, as a minimum standard of due process, the District of Columbia *Tate* and *Johnson* method: having court-appointed counsel (whose ability and integrity may be in doubt)[6] write a detailed analysis of why the case has no merit; then, after reading this memorandum, and *without looking at the clerk's and stenographic reporter's transcripts, the appellate court, if convinced by the memorandum, dismisses the appeal.* It is difficult to see how such a system encourages advocacy.

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[6]See: *Defense of the Poor in Criminal Cases in American State Courts,* Volume 2, State Reports (Silverstein, Ed. American Bar Foundation 1965), referred to in Appendix B of Petitioner's Brief. At page 141, under the appendix to the section on the District of Columbia practices, which gives comments of some members of the District Bar, in the view of at least one participating member of that Bar, about one lawyer out of every ten appointed in the District is either incompetent or indigent himself.

Petitioner's analysis stems from a gross distrust in the integrity and ability of the members of the bar appointed by appellate courts to represent indigent appellants. Petitioner argues that many appointed counsel will view the appointment as a nuisance, many others will act as an amicus and weigh the time burden imposed on court and counsel if full argument is presented, and still others will have different reasons for not briefing a case where the estimate of the chances of success are slim.

Respondent respectfully suggests that if an appellate court has little or no faith in the integrity and ability of the attorney it appoints to represent an indigent, but nevertheless utilizes only a report or analysis filed with the court by that same attorney, without itself looking at the full record and transcript, then such a court may very well be depriving its indigent appellants of due process and equal protection.

We suggest that the California system, used in the instant case and approved in *In re Nash, supra,* 61 Cal. 2d 491 (1964) is at least, and perhaps even more equitable and just in terms of due process and equal protection than the memorandum system. Under the California system, whether counsel writes a brief or says there is no merit, the court does not dismiss the appeal, but the court itself reads the entire record and researches the law, after which it writes its opinion.

Unlike the situation pertinent to appeals in the federal system discussed in *Coppedge v. United States,* 369 U.S. 438, 447-48 (1962), appeals in California are generally not dismissed for frivolity.

It is submitted that whether a court has confidence in its appointed counsel or not, the check of the court

itself reading the full record, used in California for all appeals by rich as well as poor, is certainly as valid as the required memorandum system and does not give rise to implications of violation of due process which may exist under that procedure.[7]

The California method of handling indigent appeals appears to be followed in Arizona, *State v. Burrell,* 96 Ariz. 233, 393 P. 2d 921 (1964); in Colorado, *Stanmore v. Colorado,* ....Colo. ...., 401 P. 2d 829 (1965); in Connecticut, *Fredericks v. Reincke,* 152 Conn. 501, 208 A. 2d 756, 758 (1965); in Indiana, *In re Sowders,* .... Ind. ...., 207 N.E. 2d 629 (1965); in New Mexico, *Morales v. Cox,* 75 N. Mex. 468, 406 P. 2d 177 (1965); in Oregon, *Speers v. Gladden,* 237 Ore. 100, 390 P. 2d 635, 636 (1964). The Circuit Court of Appeals for the Fifth Circuit also follows the California procedure. *Rumph v. United States,* 343 F. 2d 580 (5th Cir. 1965)[8]

We submit that the additional feature of the California system where the court also reads the full rec-

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[7]For examples of courts which evidently have confidence in the ability and integrity of their appointed bar and consequently can properly accept detailed memoranda from such counsel, see *United States v. Camodeo,* 367 F.2d 146, U.S.C.A. (2d Cir. 1966); *Stansbury v. United States,* 358 F. 2d 717, 718 U.S.C.A. (5th Cir. 1966); *State v. George,* 98 Ariz. 290, 403 P. 2d 932 (Ariz. 1965); *Petition of Stillabower,* .... Ind. ...., 210 N.E. 2d 665 (Ind. 1965).

[8]Where the circumstances may be somewhat similar and a possible *contra* view exists, see *Hammershoy v. Commonwealth,* 398 S.W. 2d 883 (Kentucky, 1966), and *Commonwealth ex rel. Cunningham v. Maroney,* 421 Pa. 157, 218 A. 2d 811 (Pennsylvania, 1966); see also, *Selman v. Alaska,* 409 P. 2d 602; *Utah v. Montez,* 17 Utah 2d 299, 410 P. 2d 764; *Clark v. Peyton,* ..... Va. ....., 150 S.E. 2d 533 (Virginia. 1966); *McLaughlin v. Wisconsin,* ..... Wisc. ....., 145 N.W. 2d 153, 154-155 (Wisconsin, 1966).

ord, goes even further than this Court's test handed down in *Ellis v. United States,* 356 U.S. 674 (1958):

> "But representation in the role of an advocate is required. If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case, then leave to withdraw may be allowed and leave to appeal may be denied."

In the instant case, Mr. Murphy studied the record, visited his client, consulted with him, concluded there was no merit and then notified the court of his professional conclusion. *Still, the appeal was not dismissed.* Appellant filed his brief pro se; then at least one court research lawyer and the judge assigned to write the opinion thoroughly studied the full record and researched the applicable law, and finally the entire court issued its detailed opinion affirming the judgment.

Appointed counsel offered representation as an advocate. After conscientious investigation, he was convinced that the appeal was without merit. Finally, the court itself read the record, researched applicable law, and was satisfied that counsel had diligently investigated all the possible grounds of appeal. Only then, after the court reached the same conclusion, did the court issue its opinion.

Where the California system used in the instant case is followed, and, after appointed counsel notifies the appellate court of his professional conclusion that the appeal is meritless, the appellate court nevertheless it-

self studies the full record and researches the law, both due process and equal protection requirements are met, without any invidious distinction existing between the rich and the poor appellant.

Conclusion.

California guaranteed petitioner as much or more due process and equal protection on his 1958 appeal than do most state and federal tribunals up until the present time, by furnishing him competent appellate counsel and a full clerk's and stenographic reporter's trial transcript which was studied by counsel as an advocate, and an appellate court that itself read the entire record before writing its opinion reaching the same conclusion reached by appointed counsel that the case was without merit.

Under the California appellate system, where the appellate court itself reads the full clerk's and stenographic reporter's transcript and then writes its detailed written opinion in the case, the indigent is as fully protected as under the District of Columbia system, where counsel writes a detailed memorandum telling the court how meritless the case really is and the court dismisses the appeal based on that memorandum, or under the written brief system, where counsel writes the same brief he would for a paying client but he and his client both know it is only a stall for time and that the judgment will eventually be affirmed.

Under the California appellate system, neither due process nor equal protection requires appointment of another lawyer when counsel first appointed finds no merit to the appeal.

For the foregoing reasons, the Order of the Supreme Court of California denying petitioner's application for habeas corpus relief should be affirmed.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General, of the State of California,

WILLIAM E. JAMES,
Assistant Attorney General of the State of California,

GEORGE J. ROTH,
Deputy Attorney General, of the State of California,

Attorneys for Respondent.